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No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Immigration and Naturalization Act confers upon the Attorney General and the Secretary of Homeland Security broad discretion to grant asylum to a "refugee" as defined in the Act, but prohibits the exercise of that discretion in favor of any person who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1158(b)(1)(A) & (2)(A), 1101(a)(42)(A).

The Act also provides that when "the Attorney General decides that [an] alien's life or freedom would be threatened in [a particular] country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," the Attorney General may deport the alien to that country only in specified circumstances; this benefit also does not extend to aliens who participate in persecution. 8 U.S.C. § 1231(b)(3)(A) & (B). The question presented is:

Whether these "persecutor bars" apply to an alien whose involvement in persecutory acts is involuntary because he engaged in the conduct due to credible threats of death or serious bodily harm.

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Vukmirovic v. *Ashcroft*,
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Watson v. *United States,*
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Displaced Persons Act of 1948,
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Hungarian Refugee Act of 1958,
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Illegal Immigration Reform and Immigrant
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Indochinese Refugee Resettlement Act,
Pub. L. No. 95-145, 91 Stat. 1223 (1977) 6, 41

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Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 110 .....*passim*

Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 643 4

Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400 (1953) 4

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72 Fed. Reg. 26138-02 30

MISCELLANEOUS

Casualties of War: Child Soldiers and the Law: Hearing before the U.S. Sen. Comm. on the Judiciary, Subcom. on Human Rights and the Law, 110th Cong. (2007)..... 9

Constitution of the International Refugee Organization of the United Nations, ...*passim*

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Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 Am. U. Int'l L. Rev. 1131 (2002)..... 10

H.L.A. Hart, *Punishment and Responsibility* 83 (1968)..... 30

Hearing on the "Material Support" Bar Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary, 110th Cong. (2007)..... 9

TABLE OF AUTHORITIES – continued

Page(s)

Immigration and Naturalization Service, General Counsel's Office, *Standard for Prosecutorial Discretion under Section 273 of the Immigration and Nationality Act*, Genco Op. No. 93-66, 1993 WL 1504013 (1993) 30, 50

International Committee of the Red Cross, *Country Report Cambodia* (1999) 5, 6

Gail P. Kelly, *Coping with America: Refugees from Vietnam, Cambodia, and Laos in the 1970s and 1980s*, 487 ANNALS AM. ACAD. POL. & SOC. SCI. 138 (1986) 5

"My Heart Is Cut": Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire, 19 Human Rights Watch, No. 11(A), *available at* http://hrw.org/reports/2007/cdi0807/cdi0807web.pdf 27

OXFORD ENGLISH DICTIONARY (2d ed.1989) 23

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United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), *reprinted in* 19 U.S.T. 6223 ..... 7, 33, 42

U.N. High Comm. for Refugees, *Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. of Refugee L. 492 (2003) 34

TABLE OF AUTHORITIES – continued

Page(s)

U.N. High Comm. for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1979) 33, 34

United Nations High Comm. for Refugees, Refugees by Numbers (2000) 10

United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S No. 6577 (1968) 7, 33

United Nations Secretary-General, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, U.N. Doc. A/61/275 (Aug. 17, 2006) 9

U.S. Comm'n on International Religious Freedom, *2004 Annual Report*, *available at* http://www.uscirf.gov/images/stories/pdf/Eritria/2004annualRpt.pdf 12

U.S. Dep't of Justice, *2006 Statistical Year Book* (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf 11

U.S. Dep't of State, *Country Reports on Human Rights Practices 2006* (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006

Burma Country Report 10

Columbia Country Report 10

Eritrea Country Report 13

Iraq Country Report 10

Somalia Country Report 11

TABLE OF AUTHORITIES – continued

Page(s)

Sudan Country Report 11
U.S. Dep't of State, *Eritrea – International Religious Freedom Report 2007*, *available at* http://www.state.gov/g/drl/rls/irf/2007/90096.htm 12, 13

BRIEF FOR PETITIONER

OPINIONS BELOW

The unpublished opinion of the court of appeals (Pet. App. 1a-3a) is reprinted in 231 Fed. App'x 325. The opinions of the Board of Immigration Appeals (Pet. App. 4a-8a) and of the Immigration Judge (Pet. App. 9a-21a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2007, and a timely petition for rehearing was denied on July 17, 2007. The petition for a writ of certiorari was filed on October 15, 2007, and granted on March 17, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, provides in pertinent part:

   (a) (42) * * * The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Section 208(b) of the INA, 8 U.S.C. § 1158(b), provides in pertinent part:

   (1) (A) The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum * * * if the Secretary of Homeland Security or the Attorney General determines that

such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(2) (A) In General—Paragraph (1) shall not apply to an alien if the Attorney General determines that—(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

3. Section 241 of the INA, 8 U.S.C. § 1231(b)(3), provides in pertinent part:

(A) In General—* * * [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception—Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that –

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

Granting asylum is a longstanding legal tradition—rooted in the customs of Ancient Egypt, Ancient Greece, and Medieval Europe—under which refugees, persecuted for their political opinions or religious beliefs in their native countries, obtain the protection of a foreign sovereign. The question in this case is whether an individual is eligible for asylum even if the persecution to which he was subjected included coerced participation in his oppressors' persecutory acts.

Federal law confers upon the Attorney General broad discretion to grant asylum, but he may not exercise that discretion in favor of any person who "ordered, incited, assisted, or otherwise participated in persecution." 8 U.S.C. § 1101(a)(42). A similar exclusion applies to the limits on the government's ability to deport victims of persecution who do not receive asylum. *Id.* § 1231(b)(3)(B). The court below held—and the government argues—that these exclusions are applicable even when an individual engaged in the persecutory conduct only because he was forced to do so by credible threats of death or serious bodily harm.

This overbroad interpretation of these "persecutor bars" finds no support in the statutory language or context. It also is contrary to the basic background legal principle—against which Congress legislated—holding that serious adverse consequences should not be based on involuntary actions. Congress did not in any way indicate its intent to override that principle. To the contrary, it is settled that the threat of being forced to engage in persecution of others itself constitutes "persecution" providing eligibility for asylum. The government's position in this case is

that the acts that make a person eligible for asylum as a victim of persecution nevertheless render him or her ineligible for asylum as a participant in persecution.

The consequences of the government's erroneous interpretation of the persecutor bar are substantial. Forced participation in persecutory acts is an increasingly common element of modern civil strife in numerous parts of the world, but under the government's view no individual subjected to that horrific treatment is eligible to be considered for a discretionary grant of asylum. This Court should correct that unsupportable result.

A. Statutory Background

1. *Pre-1980 United States Asylum Law.* The United States had no general law of asylum prior to 1980. Congress in the decades after the Second World War passed piecemeal and context-specific legislation establishing different asylum standards for refugees from particular countries, regions, and conflicts. See, *e.g.*, Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (applying exclusively to refugees who entered Germany or Austria between September 1, 1939 and December 22, 1945, or "who, having resided in Germany or Austria, [were] victim[s] of persecution by the Nazi government"); Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (asylum provisions applicable to refugees from the U.S.S.R. and communist-controlled areas of Eastern Europe); Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 643 § 15(c)(1) (refugees from communist-controlled areas and from the Middle East); Hungarian Refugee Act of 1958, Pub. L. No. 85-559, 72 Stat. 419 (applying exclusively to "refugee[s] from the Hungarian Revolution"); Cuban

Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (applying exclusively to "native[s] or citizen[s] of Cuba * * * admitted * * * into the United States subsequent to January 1, 1959").

The 1948 Displaced Persons Act (DPA) excluded from eligibility for entry into the United States individuals who "assisted the enemy [i.e., the European Axis powers in World War II] in persecuting civil populations" or "voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against [the Allied forces]." DPA § 2(b), 62 Stat. 1009 (incorporating Annex I to the Constitution of the International Refugee Organization of the United Nations (Annex I), Part I(A) & Part II). The 1953 Act barred issuance of a visa to "any person who personally advocated or assisted in the persecution of any person or group of persons because or race, religion, or national origin." 67 Stat. 406. The other statutes contained no such restriction.

A new asylum statute arose out of the conflicts in Southeast Asia, which resulted in an influx of tens of thousands of refugees to the United States during the 1970s. See Gail P. Kelly, *Coping with America: Refugees from Vietnam, Cambodia, and Laos in the 1970s and 1980s*, 487 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 139 (1986).

One characteristic of those conflicts was that persecutory acts were routinely carried out by conscripts forced against their will to participate in persecution. The International Committee of the Red Cross reported that "tens of thousands of young [Cambodian] men [were] conscripted into armies and irregular forces. * * * During the Pol Pot era, the Khmer Rouge consistently used young people, some so young that 'the gun they carried touched the ground,' to in-

timidate families and carry out executions." The International Committee of the Red Cross, *Country Report Cambodia* 7-8 (1999), *available at* http://www.greenbergreasearch.com/articles/2046/378_cambodia.pdf. Moreover, "[c]ivilian involvement in Cambodian wars * * * did not begin or end with Pol Pot. During the 1970-1975 civil war, commanders in the army of Lon Nol and guerrilla fighters conscripted village youths throughout the nation and fought scores of battles in villages." *Id.* at 24.

Congress passed the Indochinese Refugee Resettlement Act, Pub. L. No. 95-145, 91 Stat. 1223 (1977), to establish standards for the adjustment of status of refugees from Vietnam, Laos, and Cambodia who were paroled into the United States between March 31, 1975 and January 1, 1979. The statute contained a persecutor bar different from the provision in prior acts. It prohibited the Attorney General from granting asylum to

> [a]ny alien who ordered, assisted, or otherwise participated in the persecution of any person because of race, religion, or political opinion shall be ineligible for permanent residence under any provision of this [Act].

Id.§ 105 (codified as amended at 8 U.S.C. § 1255 note § 105).

2. *The Refugee Act of 1980*. Congress at the end of the 1970s recognized that "the piecemeal approach of our government in reacting to individual refugee crises as they occur is no longer tolerable." S. Comm. on the Judiciary, Refugee Act of 1980, S. Rep. 96-256, at 3, *reprinted in* 1980 U.S.C.C.A.N. 141, 143. In an express effort to incorporate the lessons learned from the Cambodian experience broadly across all future

refugee crises, (*ibid.*), Congress passed the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

The Refugee Act had two basic objectives. First, Congress intended to conform United States asylum standards with the international standards contained in the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968).[1] See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968") (citation omitted).

Second, Congress intended the Act to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449-50 (1987).

Under the standards set forth in the Act, refugees from any nation may remain in the United States by obtaining either a grant of asylum or a withholding of removal. See 8 U.S.C. §§ 1158, 1231. A grant of asylum "permits an alien to remain in the United States and to apply for permanent residency after one year," while a withholding of deportation or re-

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[1] The Protocol incorporates by reference the 1951 United Nations Convention Relating to the Status of Refugees. 189 U.N.T.S. 150 (July 28, 1951), *reprinted in* 19 U.S.T. 6223, 6259, 6264-6276. It was adopted because the Convention "covers only those persons who have become refugees as a result of events occurring before 1 January 1951," and "it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951." *Ibid.*; G.A. Res. 2198 (XXI) (1967) (preamble).

moval "only bars deporting an alien to a particular country or countries." *Aguirre-Aguirre*, 526 U.S. at 419. As long as the statutory criteria are met, "withholding is mandatory unless the Attorney General determines [an] exception[] applies," but "the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's [sole] discretion." *Id.* at 420.

In order to receive either type of relief, an alien must be "unable or unwilling to return to * * * [his home] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). But not all aliens who demonstrate a well-founded fear of future persecution on such grounds are eligible for asylum or withholding of removal. Congress excluded from eligibility any alien who had himself "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." *Ibid.*; 8 U.S.C. § 1158(b)(2)(A)(i). See also 8 U.S.C. § 1231(b)(3)(B)(i).[2]

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[2] As originally enacted in the 1980 statute, the persecutor bars to both asylum and withholding of removal used the same language. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), a comprehensive revision of the Nation's immigration laws. That law amended the INA, moving the persecutor bar relating to the withholding of removal from § 243(b)(3)(B)(i) to § 241(b)(3)(B)(i). In addition, it amended the withholding exception's language, replacing the words "on account of" with "because of." Those changes do not affect the issue in this case.

B. Asylum Applicants Increasingly Are Seeking Refuge From Violent Civil Strife Involving Coerced Participation In Persecution.

Violent conflicts around the world today frequently involve civil wars that have as a hallmark coerced participation in armed conflict. Thus, the United Nations recognizes over thirty ongoing conflicts around the world in which more than a quarter million young people have been coerced into violent armed conflict. The Secretary-General, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 11, U.N. Doc. A/61/275 (Aug. 17, 2006). As one former child soldier has testified,

> [T]here are thousands of children from ages 8 to 17 in Burma, Sri Lanka, Congo, Uganda, Ivory Coast, Colombia, just to name a few places, that are being forced to fight and lose their childhoods and their families. They are maimed and they lose their humanity, and these are the fortunate ones. Those who are less fortunate are killed in the senseless wars of adults.

Casualties of War: Child Soldiers and the Law: Hearing before the U.S. Sen. Comm. on the Judiciary, Subcom. on Human Rights and the Law, 110th Cong. (2007) (testimony of Ishmael Beah, former child soldier from Sierra Leone); see also *Hearing on the "Material Support" Bar Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First) (hundreds of thousands

of child soldiers from African countries are forced to serve in state and opposition armies); Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 Am. U. Int'l L. Rev. 1131, 1131 (2002) ("[T]he majority of refugees in the world today are * * * fleeing civil conflicts in which the distinction between oppressor and oppressed is often unclear." (citing United Nations High Commissioner for Refugees, *Refugees by Numbers* 8 (2000))).

Examples of countries in which combatants force innocent victims to take part in their persecutory acts include:

- Burma (see *Burma Country Report*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/ 78768.htm);
- Columbia (see *Columbia Country Report*, *available at* http://www.state.gov/g/drl/rls/hrrpt/ 2006/ 78885.htm);
- El Salvador (see *Doe* v. *Gonzales*, 484 F.3d 445, 447-48 (7th Cir. 2007));
- Guatemala (see *Hernandez* v. *Reno*, 258 F.3d 806 (8th Cir. 2001);
- Iraq (see *Iraq Country Report*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/ 78853.htm (citing occurrences of compelled child participation in violent activities of opposition groups);
- Peru, *Miranda Alvarado* v. *Gonzales*, 441 F.3d 750 (9th Cir. 2006), *modified on reh'g*, 449 F.3d 915 (9th Cir. 2006); *Castaneda-Castillo* v. *Gonzales*, 488 F.3d 17 (1st Cir. 2007);

- Somalia (see *Somalia Country Report*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78757.htm) (citing reports from previous year that militia groups forced minority groups into forced labor);
- Sudan (see *Sudan Country Report*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm) (noting forced military conscription of underage men and numerous abuses carried out by security forces).

Asylum claims in the United States show a pattern of increasing numbers of refugees from these countries. In fact, five of these nations – Colombia, Ethiopia, Iraq, Burma, and Somalia – ranked in the top twenty-five source countries for asylum applications granted by the United States in 2006. See U.S. Dep't of Justice, *2006 Statistical Year Book*, J2 (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. El Salvador, Guatemala, and Peru each ranked in the top twenty-five countries represented in immigration court proceedings overall. *Id.* at E2. The United States additionally received over 200 asylum applications in 2006 from several other countries known for forced participation in persecution, including Gambia, the Ivory Coast, Liberia, and Sierra Leone; and nearly 100 asylum applications from the Sudan. *Ibid.*

C. Factual Background

1. *The Ethiopian-Eritrean War*. One civil conflict in which coerced participation occurred with great frequency was the war between Ethiopia and Eritrea, which took place for most of the forty years between the 1960s and 2000, the longest continuous

war in African history. Eritrea's human rights abuses were a well recognized feature of this conflict.

During the war and continuing today, the Eritrean government persecuted individuals on the basis of their religious beliefs, especially singling out Protestant Christians. See U.S. Comm'n on International Religious Freedom. 2004 Annual Report 19-20, *available at* http://www.uscirf.gov/images/stories/pdf/Eritria/2004annualRpt.pdf; U.S. Dep't of State; *Eritrea—International Religious Freedom Report 2007*, *available at* http://www.state.gov/g/drl/rls/irf/2007/90096.htm. Hundreds of individuals were imprisoned for their religious beliefs. The State Department report states:

> Often, detainees were not formally charged, accorded due process, or allowed access to their families. While many were ostensibly jailed for evasion of military conscription, significant numbers were being held solely for their religious beliefs, and some were held in harsh conditions that included extreme temperature fluctuations. There were reports of torture. Many were required to recant their religious beliefs as a precondition of release.

Ibid.; see also U.S. Comm'n on International Religious Freedom, *supra*, at 20 ("[r]eligious repression is alleged to be particularly severe in the armed forces. * * * * [A]ny military personnel found in possession of a Bible reportedly face severe punishment").

Most pronounced among Eritrea's human rights violations is, as the Department of State has documented, Eritrea's "arbitrary arrest and detention" of its citizens in connection with their refusal of or re-

sistance to forced military service. U.S. Dep't of State, *Eritrea Country Report on Human Rights Practices* 2006 (2007) [hereinafter Eritrean Country Report].[3] The Eritrean government routinely "round[ed] [up] young men and women for national service," and "incarcerat[ed] and tortur[ed] family members of national service evaders." *Ibid.* Those put in jail faced "harsh and life threatening prison conditions," including "torture and beatings." *Ibid.*

The Department of State explains that the current Eritrean government still "use[s] * * * deadly force against anyone resisting or attempting to flee during military searches for deserters and draft evaders," and that "persons detained for evading national service [often] die[] after harsh treatment by security forces." *Eritrean Country Report.* The report includes accounts of "individuals [being] severely beaten and killed during government roundups of young men and women for national service." *Ibid.*

2. *Petitioner's Persecution in Eritrea.*[4] Petitioner Daniel Girmai Negusie was a citizen and resident of Eritrea during the Ethiopian-Eritrean war. One day in 1994 when petitioner was 18 years old, he went to his town's theater to see a movie. J.A. 4. Soldiers surrounded the theatre; when the audience left the theatre at the movie's conclusion, everyone was "apprehended and hand-tied by rope." *Id.* at 4-5. The soldiers shot at anyone who attempted to escape. *Id.*

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[3] The *Eritrean Country Report* is available at http://www.state.gov/g/drl/rls/hrrpt/2006/78733.htm.

[4] The Board of Immigration Appeals upheld the Immigration Judge's finding that petitioner was credible. Pet. 4a. The court of appeals did not address that determination, because it found petitioner's claim of duress irrelevant as a matter of law. Pet. 2a.

at 5. His captors subsequently forced petitioner to perform "hard labor" in a salt mine. *Id.* at 6. Anyone who attempted to escape and was caught was "kept in the sun for three days without food and water." *Id.* at 7-8.

After a month in the salt mines, petitioner was forced to undergo military training for six months. J.A. 9. Following his training, he was pressed into service as a gunner on a naval vessel patrolling the Red Sea. *Id.* at 10-11. He testified that during this service, he never fired the gun at any person or vessel. See Pet. App. 16a.

Following his conscription in the Eritrean navy, petitioner was discharged and took a job as a painter aboard a ship. J.A. 11. In 1998, however, the conflict with Ethiopia re-erupted, and petitioner was conscripted once again. *Id.* at 12, 15, 18. Petitioner refused to fight because he considered Ethiopians his "brothers." *Id.* at 18-19. As a result of his refusal to fight and because he is half-Ethiopian, petitioner was taken to prison, where he was placed in solitary confinement for six months. *Id.* at 19-20. Petitioner remained imprisoned under harsh conditions, forced to perform hard labor, for an additional one and a half years after his solitary confinement. *Id.* at 20-21.

During his imprisonment, petitioner converted to Protestant Christianity, for which he was subjected to additional persecution. J.A. 22-23. At one point, he was forced to roll on the ground in the hot sun while being beaten with a stick every day for two weeks for talking with fellow Christians in the prison. *Id.* at 23-24.

Once petitioner was released from prison in 2001, the prison camp's commanding officer directed him

to assume "duties as a prison guard and also in the surveillance * * * of the base." J.A. 26. Petitioner was never permitted to leave the military base and would have been executed had he tried to flee. *Id.* at 38-40. In fact, petitioner testified that at least two of his friends were killed in the course of trying to escape from their forced service as guards. *Id.* at 41-42.

While forced to serve as a prison guard, petitioner was told to "bring[] out the prisoners from their cells and punish[] them." J.A. 33-34. Petitioner, however, "objected [and] declined taking such an action of punishing the prisoners" because it offended his beliefs as a Christian. *Id.* at 34. Instead, in the face of threatened execution (*id.* at 37-38), when ordered to punish and torture the prisoners, petitioner "did the [opposite] of what they ordered me [to do]" (*id.* at 34). Rather than denying the prisoners showers, for instance, he permitted them to take showers in secret at night. He also gave the prisoners food, water, and cigarettes in secret, and let them out into the fresh air at night. *Id.* at 35-38. Although he witnessed torture take place, he never himself beat or killed anyone during his forced service. *Id.* at 35-37.

After almost four years of coerced service at the military base and prison, petitioner resolved to risk death in escape rather than continue coerced service for his captors. J.A. 40, 42. He fled in the dark of night to a friend's house. *Id.* at 43. Each night for the next five nights, he and another escapee swam out to a container ship anchored in the Red Sea. *Id.* at 45-48. On the fifth night, they finally opened a ventilation shaft and sneaked into a container, bringing food and water with them. *Id.* at 48-49. Over one month later, petitioner arrived in the United States and filed for asylum. *Id.* at 50.

D. Proceedings Below

1. *Administrative Proceedings.* The Immigration Judge (IJ) rejected petitioner's asylum claim and his claim for withholding of removal. Pet. App. 9a-20a. The IJ found that petitioner was credible and that there was "no evidence to establish that [petitioner] is a malicious person or that he was an aggressive person who mistreated the prisoners." *Id.* at 16a. Nevertheless, the IJ determined that "the very fact that he helped keep [the prisoners] in the prison compound where he had reason to know that they were persecuted constitutes assisting in the persecution of others and bars [petitioner] from relief." *Id.* at 16a-17a (citing *Fedorenko* v. *United States*, 449 U.S. 490 (1981); *Bah* v. *Ashcroft*, 341 F.3d 348 (5th Cir. 2003) (per curiam)).

The Immigration Judge went on to find that "it is more likely than not that [petitioner] would be tortured if returned to his native land" because he was a deserter from the armed forces and because of his religion, his political opinion, and his nationality. Pet. App. 20a; see also *id.* at 18a-19a. He based this conclusion on the Eritrean government's use and threatened use of deadly force and torture. *Id.* at 19a. He granted petitioner's request for deferral of removal under the Convention Against Torture, due to the torture that petitioner would again face if returned to Eritrea.[5]

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[5] Deferral of removal is available to those aliens who would qualify for asylum and withholding of removal but for the application of a "mandatory denial" such as the persecutor bar. 8 C.F.R. § 1208.17. Deferral of removal "[d]oes not confer upon the alien any lawful or permanent immigration status in the United States." 8 C.F.R. § 1208.17(b)(1)(i). Without any legal right to be in the country, petitioner may be detained at any

In an unpublished decision, a single panel member of the Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 4a-8a. She determined that "[t]he fact that the [petitioner] was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial." *Id.* at 6a. The panel member reached this conclusion because, in her view, "an alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution * * *. [I]t is the objective effect of an alien's actions which is controlling." *Ibid.* (internal quotation marks omitted; citing *Matter of Fedorenko*, 19 I. & N. Dec. 57, 69 (BIA 1984)).

The BIA also upheld the IJ's finding that "the Eritrean government, which has a terrible overall human rights record, specifically engaged in mistreatment and torture against army deserters" and that therefore petitioner "is more likely than not to be tortured upon a return to Eritrea by the Eritrean government." Pet. App. 8a. It therefore rejected the government's challenge to petitioner's deferral of removal, because petitioner again would suffer likely torture and threats of death if returned to Eritrea.

2. *The Court of Appeals' Decision.* The court of appeals denied the petition for review of the BIA's decision. Pet. App. 1a-3a. Applying *Bah*, 341 F.3d at 351, the court ruled that "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." Pet. App. 2a.

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time by the Department of Homeland Security and "may be removed at any time to another country where he or she is not likely to be tortured." 8 C.F.R. § 1208.17(b)(2), (c).

In *Bah*, the Fifth Circuit had upheld the application of the persecutor bar to a young man who had been forced to assist the Revolutionary United Front (RUF) insurgency in Sierra Leone, another country torn by violent civil strife. RUF soldiers who had "raped and killed [Bah's] sister" and "incinerated his father" in front of him, offered him "the option to join the RUF or die." 341 F.3d at 349. Bah understandably decided to join. "Bah twice tried to escape * * *. During his second captivity, soldiers poured palm oil on his back and placed him face down with his back towards the sun in order to burn him." *Id.* at 350. Under the constant threat of continued torture and death, Bah was coerced into committing a number of violent acts, including the taking of lives. *Ibid.* In his third escape attempt, Bah reached the United States where he applied for asylum.

The Fifth Circuit upheld the BIA's determination that the persecutor bar precluded a grant of asylum to Bah despite "his forced recruitment" and forced participation in the activities of the RUF. *Bah*, 341 F.3d at 351. "The syntax of the statute," the court concluded, "suggests that the alien's personal motivation is not relevant. * * * Bah participated in persecution, and the persecution occurred because of an individual's political opinions." *Ibid.*

The court below concluded that *Bah* controlled the disposition of petitioner's appeal in this case. It acknowledged that petitioner "did not affirmatively, personally injure the prisoners, and he objected to, and occasionally disobeyed, orders to inflict punishment, [and] did favors for prisoners." Pet. App. 2a-3a. The court nevertheless held that "[t]he question whether an alien was compelled to assist authorities [in persecution] is irrelevant." *Id.* at 2a (citing *Bah*, 341 F.3d at 351). Instead, "the inquiry should focus

'on whether particular conduct can be considered assisting in the persecution of civilians'" without consideration of whether the alien was forced under threat of death or torture to provide that assistance. *Ibid.* (quoting *Fedorenko*, 449 U.S. at 512 n.34).

SUMMARY OF ARGUMENT

A refugee fleeing persecution should be eligible for asylum and for withholding of removal when the persecution that he suffered included being forced upon threat of death or serious injury to participate in the persecutory acts of his oppressors. The statutory "persecutor bar"—which provides that a person who "ordered, incited, assisted, or otherwise participated in persecution" (8 U.S.C. § 1101(a)(42)) may not seek a discretionary grant of asylum or obtain withholding of removal—is not triggered by such involuntary acts.

The critical term in the statute—"persecution"—is not simply a description of objective conduct; it requires in addition that the actor's state of mind satisfy a standard of moral offensiveness. That standard is met when the conduct is motivated by animus toward the persecuted group or when the actor is indifferent but decides to participate voluntarily, whether for financial gain or simply because he is unwilling to exercise his ability to choose a different course. Involuntary acts that are the product of threats of death or serious injury are not a voluntary choice at all and therefore occupy a far different place on the scale of moral offensiveness.

Indeed, courts have upheld asylum claims by individuals who would be forced to participate in persecution if returned to their countries, finding that these individuals are therefore subject to "persecution." If forcing individuals to engage in persecutory

acts is itself persecution, Congress could not have meant to withdraw asylum eligibility for those very same persons. That would be akin to labeling the victim of a crime as an aider and abettor of that crime, a conclusion that this Court has squarely rejected.

The interpretation that is plain from the language of the statute also is supported by the general principle, well-established in both criminal and civil law, that individuals should not suffer serious adverse consequences on the basis of involuntary acts. Because Congress legislated against this background principle, and the persecutor bar contains no indication that Congress intended to override it, the provision should not be interpreted to apply to coerced conduct.

The statutory context provides still more support for this conclusion. Congress enacted the persecutor bar to conform United States law to the 1967 United Nations Protocol Relating to the Status of Refugees. That Protocol's persecutor bar is triggered by criminal conduct, and therefore incorporates criminal law concepts such as an excuse based on duress. The implementing statute should be read in the same manner.

Moreover, Congress enacted the statute containing the persecutor bar to apply generally to asylum claims, altering its earlier practice of conflict and country-specific legislation, and sought to confer broad discretion on the Attorney General to resolve asylum claims arising from a variety of factual contexts. Construing the persecutor bar to exclude involuntary acts precludes the Attorney General from exercising his discretion with respect to an increasingly common characteristic of asylum-seekers.

The government and the Fifth Circuit base their conclusion that the persecutor bar does encompass involuntary acts on this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which construed a provision of the 1948 Displaced Persons Act governing grants of visas to individuals displaced by World War II. *Fedorenko* is entirely inapplicable here. It construed the provision of a different statute with different statutory language enacted in a very different statutory context.

The Displaced Persons Act addressed a specific set of refugees in the context of a particular—and particularly horrific—crime against humanity. The provision at issue here, by contrast, was adopted to conform United States law to the 1967 Protocol and to provide the Attorney General with broad discretion to address a wide variety of asylum claims. There simply is no basis for applying *Fedorenko*'s rule in this very different context.

The Court's decision in *Fedorenko* pointed to the particular structure of the controlling provision: the restriction had two subsections, one addressing persecution of civilians and one addressing assistance to enemy forces. The word "voluntarily" was included in only the latter subsection. The Court found that the exclusion of "voluntarily" from the subsection relating to persecution of civilians was sufficient to establish congressional intent to override the general principle against imposing serious adverse consequences on the basis of involuntary acts. Because "voluntarily" does not appear in the persecutor bar provision at issue here, however, this reasoning is inapplicable to this case. The Court should therefore construe the persecutor bar in accordance with its common sense meaning and the well-settled background legal principle.

ARGUMENT

THE PERSECUTOR BAR IS NOT TRIGGERED BY INVOLUNTARY CONDUCT THAT IS THE PRODUCT OF CREDIBLE THREATS OF DEATH OR SERIOUS BODILY HARM

The statutory provisions at issue in this case provide no basis for the court of appeals' counter-intuitive conclusion that an individual subjected to persecution, and forced by his oppressors—as part of that persecution—to engage in persecutory acts against others, is not eligible to seek a discretionary grant of asylum. To the contrary, Congress clearly intended to preserve such individuals' eligibility for asylum. This Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), on which the government and the lower court principally rely, provides no support for their contrary position. Rather, the different characteristics of the Displaced Persons Act provision interpreted in *Fedorenko*—characteristics that are not present here—make clear that the Court's decision has no application to the issue in this case.

A. The Statutory Provisions Do Not Encompass Involuntary Conduct.

Each of the tools of statutory analysis utilized by this Court—the words Congress chose, the background legal principles against which Congress acted, the statutory context, and the general rule that ambiguous statutes must be construed in favor of an asylum-seeker—establishes that the persecutor bar does not encompass involuntary acts.

1. The Plain Language Makes Clear That Involuntary Acts Do Not Implicate The Persecutor Bar.

"The starting point in discerning congressional intent is the existing statutory text * * *." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). The plain meaning of the words Congress used leaves no doubt that involuntary acts cannot provide grounds for invoking the persecutor bar's prohibition.

The bar applies to an individual who has "ordered, incited, assisted, or otherwise participated in the persecution of any person" on the basis of a prohibited category. 8 U.S.C. § 1158(b)(2)(A); see also *id.* §§ 1101(a)(42) & 1231(b)(3)(B)(i).

The provisions' critical term—"persecution"—is defined as "the action of pursuing or persecuting a person or group with hostile intent." OXFORD ENGLISH DICTIONARY 591 (2d ed. 1989). The Latin root of "persecution," *prosequ*, means "to seek out, to pursue, to follow with hostility or malignity * * * on religious grounds." *Ibid.*

Whether one person has "persecuted" another thus does not turn solely on his or her objective conduct; rather, the actor's conduct, his state of mind and other relevant facts must satisfy a standard of moral offensiveness. Indeed, the lower courts have expressly recognized this requirement in defining the proof of "persecution" required to demonstrate eligibility for asylum. The Tenth Circuit, for example, has defined persecution in this context as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) ***in a way regarded as offensive***." *Chaib* v. *Ashcroft,* 397 F.3d 1273, 1277 (10th Cir. 2005) (internal quotation marks omitted;

emphasis added); see also *Karouni* v. *Gonzales,* 399 F.3d 1163, 1171 (9th Cir. 2005).

Involuntary acts that are the product of threats of death or serious injury plainly do not satisfy that statutory standard. Such coerced conduct occupies a far different place on the scale of moral offensiveness than conduct that is motivated by animus toward the persecuted group and even actions by persons who are indifferent toward the persecutory purpose but decide nonetheless to participate voluntarily, whether to curry favor with the instigators, or to obtain financial rewards or some other benefit, or simply because they are not willing to exercise their ability to choose a different course. Individuals whose actions are coerced are not able to make a voluntary choice at all. They therefore cannot be said to have engaged in persecution.

Instead of employing the term "persecuted," which might have produced uncertainty about the types of conduct that constituted "persecut[ing]," the statute describes with more particularity the category of conduct that triggers the bar by applying a series of verbs to "persecution": "ordered, incited, assisted, or otherwise participated in the persecution of any person." The listing of these verbs does not vitiate the requirement of moral offensiveness that is inherent in the term "persecution."

To begin with, "participated in * * * persecution" plainly has the same meaning as "persecuted": having decided to employ the series of verbs, Congress needed a catch-all term covering the commission of persecution itself, and this phrase fills that requirement. "Participated" does not override the requirements inherent in "persecution." Rather, as this Court recognized in *Reves* v. *Ernst & Young*, 507

U.S. 170, 177-79 (1993), "participate" is limited by the "context" in which it appears. In *Reves*, that term took on the limitations of the term "conduct" (requiring "an element of direction"); here, it takes on the limitations of "persecution" (requiring moral offensiveness).

Next, the statutory formulation makes clear that the other listed verbs merely describe different ways of participating in persecution—"ordered, incited, assisted, ***or otherwise participated*** in the persecution" (emphasis added). Thus, Congress simply wished to make clear that the more specifically described conduct constituted "participat[ing]"; it did not mean to define new categories of conduct. And, as we have discussed, a person can participate in persecution only if his conduct is morally offensive.

Even taken on their own terms, moreover, Congress's inclusion of these additional verbs provides no basis for applying the persecutor bar to individuals whose actions do not exhibit the requisite moral offensiveness. Under federal criminal law, the imposition of liability on a person who "aids, abets, counsels, commands, induces or procures [the] commission" (18 U.S.C. § 2(a)), still requires proof that such individuals act with the same degree of culpability as a principal engaged in the particular criminal conduct. See, *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) ("[i]n order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to

make it succeed'") (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.)).[6]

More fundamentally, extending the persecutor bar to situations in which an individual's acts are coerced simply does not comport with "the language as we normally speak it" or "what [Congress's] words will bring to the mind of a careful reader." *Watson* v. *United States*, 128 S. Ct. 579, 583 (2007); see also *McBoyle* v. *United States*, 283 U.S. 25, 26 (1931) (rejecting statutory interpretation that had no relation to the "popular picture" that the "phrase under discussion calls up").

The formulation "ordered, incited, assisted or otherwise participated in * * * persecution" plainly conveys the idea of a morally ***blameworthy*** actor. Under the Fifth Circuit approach endorsed by the government, however, these words would apply to individuals who are utterly ***blameless***.

For example, attacking an armed persecutor in self-defense could be described as having the "objective effect" of furthering persecution if, as a result, the persecutor fired his gun and killed another person whom the persecutor was intent on oppressing. But the conclusion that the person who was impelled

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[6] As this Court has observed, the doctrine of aiding and abetting "has been at best uncertain in application" to civil claims with cases outside the securities law context "'largely confined to isolated acts of adolescents in rural society.'" *Cent. Bank* v. *First Interstate Bank*, 511 U.S. 164, 181 (1994) (citation omitted). Courts that have addressed the issue have required a showing of culpability similar to this Court's decision in *Nye & Nissen*. See, *e.g.*, *E. Trading Co.* v. *Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000) (Posner, J.) ("one who aids and abets a fraud, *in the sense of assisting the fraud and wanting it to succeed*, is himself guilty of fraud") (emphasis added).

to defend himself therefore "assisted or otherwise participated in persecution" would be bizarre, precisely because no one would see him as a morally responsible agent. See, *e.g.*, *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (overturning application of the persecutor bar to an asylum-seeker whom the BIA had concluded had "participated in" persecution as a matter of "self defense").

One technique used frequently by persecutors is to force members of the group they are persecuting to engage in unwanted and offensive sexual behavior with other members of the oppressed group. *"My Heart Is Cut": Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire*, 19 Human Rights Watch, No. 11(A) (2007), *available at* http://hrw.org/reports/2007 /cdi 0807/cdi0807web.pdf (detailing use of forced incest as form of persecution in ethnic warfare). Under the government's strained reading of the persecutor bar, such persons would be deemed to be "participating in" persecution of one another.

Such individuals plainly are not persecutors; they are victims of persecution. Indeed, lower courts have reached that conclusion in addressing claims for asylum by aliens arguing that they would be subject to "persecution" if returned to their home countries because they would be forced to engage in persecutory acts. Finding that such coercion would itself constitute "persecution," these courts have found such individuals eligible for asylum. See, *e.g.*, *Islami* v. *Gonzales*, 412 F.3d 391, 397 (2d Cir. 2005) (asylum applicant's "fear of retribution for refusing to participate in a military known to perpetrate crimes against humanity * * * clearly rose to the level of past persecution"); *Vujisic* v. *INS*, 224 F.3d 578 (7th Cir. 2000) (same); *Ramos-Vasquez* v. *INS*, 57 F.3d 857 (9th Cir.

1995) (reversing denial of asylum to individual who feared being forced to commit crimes against humanity).

Because—as these courts have indicated—forcing individuals to engage in persecutory acts is itself persecution that makes such individuals eligible for asylum, Congress could not have meant the persecutor bar to withdraw asylum eligibility from those very same persons. Saying that the acts that render someone a victim of persecution also make him a "participa[nt] in" it is akin to the flawed logic rejected by the doctrine that a victim of a crime cannot be convicted of "aiding and abetting" that very crime. See generally *United States* v. *Pino-Perez*, 870 F.2d 1230, 1232 (7th Cir. 1989) (en banc) (Posner, J.) (neither the "the victim of [a] crime" nor "members of a group that the criminal statute seeks to protect" can be charged with aiding and abetting violation of that criminal offense under 18 U.S.C. § 2) (citing *Gebardi* v. *United States,* 287 U.S. 112, 123 (1932)). This Court should reject such an irrational construction of the statute.

2. Statutes That Impose Serious Adverse Consequences Are Presumed To Exclude Involuntary Conduct.

Even if Congress's intention to exclude involuntary conduct from the persecutor bar were not plain from the statutory language, the court of appeals' conclusion that duress is "irrelevant" is insupportable. The general principle that individuals should not suffer serious adverse consequences on the basis of involuntary acts—either because coerced conduct is not a legally cognizable "act" or because duress is a defense—is so well-established in our legal system that statutes should not be interpreted to the con-

trary absent an express indication that Congress intended to override this fundamental principle. Because there is no such express indication here, the Court should hold that the persecutor bar does not encompass acts coerced under threat of death or serious bodily harm.

The Court has "recognize[d] that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law, and that therefore a defense of duress or coercion may well [be] contemplated by Congress" even though it has not expressly provided for one. *United States* v. *Bailey*, 444 U.S. 394, 415 n.11 (1980) (citation omitted); see also *Dixon* v. *United States*, 548 U.S. 1, 2 (2006); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced").

This presumption extends to noncriminal laws that result in serious consequences for an individual. Courts have recognized, for example, that duress is relevant to civil tax fraud (see *Furnish* v. *Comm'r*, 262 F.2d 727 (9th Cir. 1958)); civil contempt (see *In re Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881 (7th Cir. 1989)); and civil penalties for violating export sanctions (see *Office of Foreign Asset Control* v. *Voices in the Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004)). In none of these civil statutes had Congress expressly excluded liability based on involuntary acts, but courts presumed that they nonetheless did not encompass such conduct.[7]

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[7] See also RESTATEMENT (SECOND) OF CONTRACTS §§ 174 & 175 (1981) (contract is void if manifestation of assent is compelled by physical duress and voidable if manifestation of assent is in-

Indeed, both courts and the government have also recognized the presumption of excusing conditions, including duress, with respect to other provisions of the immigration laws. The Eleventh Circuit, for example, has repeatedly recognized duress as a defense to liability for carrier fines under 8 U.S.C. § 1323, which prohibits the bringing of illegal aliens into the country. *Lyden* v. *Howerton*, 783 F.2d 1554, 1557 (11th Cir. 1986) ("It is now the settled law of this circuit that duress is available as a defense to violations of 8 U.S.C. § 1323."); *United States* v. *Sanchez*, 520 F. Supp. 1038 (S.D. Fla. 1981), *aff'd,* 703 F.2d 580 (11th Cir. 1983). See also Immigration and Naturalization Service, General Counsel's Office, *Standard for Prosecutorial Discretion under Section 273 of the Immigration and Nationality Act*, Genco Op. No. 93-66, 1993 WL 1504013, at n.7 (1993) (recognizing that both duress and absence of *mens rea* defeat liability under this provision).

The Secretary of Homeland Security has determined that the exclusion established by 8 U.S.C. § 1182(a)(3)(B)—which, among other things, bars admission of aliens who have provided material support to terrorist organizations—"shall not apply with respect to material support ***provided under duress*** to a terrorist organization * * * if warranted by the totality of the circumstances." 72 Fed. Reg. 26138-02 (May 8, 2007) (emphasis added). Like the very similarly worded persecutor bar, Section 1182(a)(3)(B) contained no express reference to duress at the time

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duced by threats of use of physical force). See generally H.L.A. Hart, *Punishment and Responsibility* 83 (1968) (drawing "attention to the analogy between conditions that are treated by criminal law as excusing conditions and certain similar conditions that are treated in another branch of law as invalidating certain civil transactions").

this exception was adopted by the Secretary. The Secretary nonetheless concluded that the statutory language did not preclude an exception for involuntary acts.[8]

This broad legal recognition of duress strongly supports the application of this general principle to the persecutor bar. Indeed, the persecutor bar carries consequences for asylum-seekers that are far harsher than those at issue in many of the cases cited above. When the government imposes a categorical bar on the granting of asylum and withholding of removal on a refugee like petitioner, it may lead to returning him to forms of treatment that no federal criminal statute would ever countenance. See, *e.g.*, *INS* v. *Errico*, 385 U.S. 214, 225 (1966) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile." (internal quotation marks omitted; citing *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947)); *Bridges* v. *Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J. concurring) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death.").

Against this background, there is no basis for exempting the persecutor bar from this general principle. The intent to impose serious adverse consequences based on involuntary acts cannot be imputed

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[8] Congress subsequently codified the relevance of the duress defense to application of the "material support" bar. See Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 691, 121 Stat 1844, 2364 (Dec. 26, 2007) (codified at 8 U.S.C. § 1182).

to Congress absent an unambiguous and explicit indication that it meant to disregard principles of blame so "universal and persistent" in American law. *Morissette*, 342 U.S. at 250. The persecutor bars contain no such indication.

3. The Statutory Context Confirms That The Persecutor Bar Does Not Apply To Involuntary Acts.

The court of appeals' conclusion that duress is "irrelevant" not only does violence to the natural reading of the persecutor bar's text. It also is wholly inconsistent with the context in which Congress acted when it enacted the persecutor bar in the 1980 Refugee Act. *First*, as this Court has recognized, Congress sought to conform domestic law to U.S. treaty obligations—and those obligations do not permit imposition of a persecutor bar on the basis of involuntary acts. *Second*, Congress was responding to the limits of prior, conflict-specific statutes and sought to grant flexible asylum authority that would allow the Attorney General to respond to a myriad of different factual contexts. Precluding the Attorney General from exercising his discretion when an asylum applicant has been coerced to engage in persecution significantly limits that flexibility, especially in view of the frequency with which persecutors use such coercion as a tool for accomplishing their goals.

a. "'[O]ne of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999) (citation omitted; quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987)).

The Protocol essentially incorporates the terms of the 1951 United Nations Convention Relating to the Status of Refugees. See note 1, *supra*. The Convention exempts from asylum persons who have "committed a crime against peace, a war crime, or a crime against humanity" or "committed a serious nonpolitical crime outside the country of refuge prior to his admission to that country as a refugee" or have "been guilty of acts contrary to the purposes and principles of the United Nations." Art. I(F). By stating that a disqualification for engaging in persecutory conduct occurs when the individual has committed "crime[s]"—"war crime[s]" or "a crime against humanity"—the Convention makes clear that involuntary acts do not trigger the persecutor bar.

That conclusion is confirmed by the U.N. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, which this Court has recognized "provides some guidance in construing the provisions added to the INA by the Refugee Act." *Aguirre-Aguirre*, 526 U.S. at 427.

Of particular relevance here, at the time Congress drafted the Refugee Act, the Office of the High Commissioner for Refugees had authoritatively interpreted the Protocol's "exclusion clauses" to apply only to asylum-seekers whose "acts [are] of a criminal nature," including acts of "instigators and accomplices." U.N. High Commission for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/4Eng/Rev.1 ¶ 162 (reedited 1992) [hereinafter *Handbook*].

In evaluating the applicability of the exclusion clauses, moreover, the *Handbook* stated "all the relevant factors—including any mitigating circumstances—*must* be taken into account." *Id.* ¶ 157 (emphasis added). Finally, "due to their nature and the serious consequences of their application to a person in fear of persecution," the *Handbook* admonished that "the exclusion clauses should be applied in a restrictive manner." *Id.* ¶ 180.

Congress thus was aware at the time it adopted the Refugee Act that the international legal standards with which it sought to conform United States law permitted exclusion only for criminal acts and required consideration of "mitigating circumstances" such as duress. The only logical conclusion is that, in drafting the Refugee Act, Congress did not intend to impose the persecutor bar on the basis of involuntary acts. Any other result would frustrate Congress's goal of bringing United States law into conformity with international standards.[9]

b. Prior to the adoption of the Refugee Act, Congress authorized grants of asylum on a conflict-specific basis; each statute applied only to refugees from specific conflicts or nations. See pages 4-6, *su-*

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[9] In 2003, the U.N. High Commission for Refugees issued guidance elaborating on the *Handbook*, explaining that the rationale for the exclusion clauses is that "certain acts are so grave as to render their perpetrators undeserving of international protection as refugees." Thus the persecutor bar applies only to "responsib[le]" aliens who act purposefully, an element that may be defeated by traditional "defenses to criminal responsibility" including "duress." U.N. High Commission for Refugees, *Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. of Refugee L. 492, 498 (2003).

pra. The Refugee Act for the first time sought to create a system applicable to all future conflicts to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *Cardoza-Fonseca*, 480 U.S. at 449-50.

In determining how to address in the Refugee Act the status of aliens alleged to have engaged in persecution, Congress could look to several approaches in prior legislation. First, the Displaced Persons Act, which applied to refugees from post-war Germany and Austria; second, the language of the Refugee Relief Act; third, the statutes applicable to refugees from Hungary and Cuba; and fourth, the Indochinese Refugee Act. See pages 5 & 6, *supra*.

Congress selected the fourth—and most recent—alternative. Recognizing that the new statute would apply to refugees who had experienced very different types of persecution, it is likely that Congress made that choice because it sought to maximize the ability of the Attorney General to exercise discretion to adapt the country's asylum policy to the myriad different factual circumstances that asylum-seekers can present—including the increasingly-common situation in which part of the persecution to which individuals are subjected is requiring them to engage in persecution themselves. See pages 9-13, *supra*.

The Fifth Circuit's rule ignores the historical context in which Congress drafted the Refugee Act. The fact that an asylum-seeker like petitioner was persecuted paradoxically renders him ineligible, rather than eligible, for relief, starkly conflicts with Congress's goal of providing flexible discretionary authority sufficient to reach victims of all of the various types of persecution.

4. Any Ambiguity In The Persecutor Bar Must Be Resolved In Favor Of An Asylum-Seeker.

This Court has followed a "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449 (citations omitted); see also *Errico*, 385 U.S. at 225; *Costello* v. *INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). Like the rule of lenity in criminal law, this canon of construction "strikes the appropriate balance between the legislature * * * and the court" (*Liparota* v. *United States*, 471 U.S. 419, 427 (1985)), ensuring that Congress defines the circumstances under which the harsh measure of deportation is to apply.

In cases where this Court believes that an asylum statute's language admits of more than one interpretation, it thus "will not assume that Congress meant to trench on [asylum-seekers'] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan*, 333 U.S. at 10. If Congress's intent conflicts with the more narrow reading, Congress can utilize the "simple remedy" of "insertion of a brief appropriate phrase, by amendment, into the present language" of the persecutor bar. *Bifulco* v. *United States*, 447 U.S. 381, 401 (1980). Ultimately, if the persecutor bar is to be extended in a manner inconsistent with common meaning and settled legal principles, "it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks." *Ibid.*

5. Construing The Persecutor Bar To Exempt Involuntary Conduct Will Not Limit The Government's Ability To Exercise Discretion In Immigration Decisions.

Every individual eligible for asylum is not entitled to receive it. "[T]he decision whether asylum should be granted to an eligible alien is committed to the Attorney General's [sole] discretion." *Aguirre-Aguirre*, 526 U.S. at 420. For that reason, a holding by this Court that the persecutor bar does not encompass involuntary conduct need not require the grant of asylum to a single alien. It simply will permit the Attorney General to exercise his discretion with respect to these now-eligible aliens.

With respect to withholding of removal, the inapplicability of the persecutor bar would simply prevent the Attorney General from removing an individual to the particular country where the alien has a credible fear of torture or death. The Attorney General would retain the ability to deport that individual to any other "country whose government will accept the alien into that country." 8 U.S.C. § 1231(b)(1)(E). This is the same solution the statute already contemplates for situations where removal to an alien's country of origin is, for whatever reason, "impracticable, inadvisable, or impossible." *Ibid.*

Moreover, the Convention Against Torture already restricts the Attorney General's authority to remove an individual to a country in which he would be subjected to persecution—even if the individual engaged in persecution. That is why petitioner obtained a deferral of removal under the Convention. See page 16 & n.5, *supra*. Thus, although withholding of removal does impose some additional restric-

tions on the government, the practical impact on the government's authority to remove an alien to whom the Attorney General determines not to grant asylum is not substantial.

* * * * *

This Court has not specified the elements of proof of involuntariness in the criminal context. *Dixon*, 548 U.S. at 4 n.2. Generally, the lower courts have concluded that three elements are required: "(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm." *United States* v. *Portillo-Vega*, 478 F.3d 1194, 1197 (10th Cir. 2007) (internal quotation marks omitted), *cert. denied*, 128 S. Ct. 1442 (2008). See also *United States* v. *Gamboa-Cardenas*, 508 F.3d 491, 505 (9th Cir. 2007); *United States* v. *Naovasaisri*, 150 Fed. App'x 170, 174 (3d Cir. 2005).[10]

Even under this criminal law standard—a standard likely more demanding that what would be needed to satisfy the immigration laws—the proof adduced by petitioner is plainly sufficient. There is no question that petitioner suffered under the constant and immediate threat of death or serious bodily harm. The torture he previously underwent and the executions he witnessed confirmed that these threats would be carried out. See pages 15-16, *supra*. These

[10] The threat of death or seriously bodily harm may be directed against the person who engaged in the involuntary acts or against a third party, such as a family member, to coerce the individual to engage in those acts. See, *e.g.*, *United States* v. *Otis*, 127 F.3d 829, 835 (9th Cir. 1997) (duress instruction appropriate when defendant's father was kidnapped to compel defendant to engage in criminal activity).

facts establish that petitioner's conduct was involuntary.

Even if the Court concludes that proof of coercion is not sufficient to render the persecutor bar inapplicable, and that it simply is one factor to consider in determining whether an individual engaged in persecution (see *Hernandez* v. *Reno*, 258 F.3d 806, 814 (8th Cir. 2001)), the bar would not apply to petitioner. Like Hernandez, petitioner endured the most extreme of threats. Petitioner's conduct, however, remained minimally offensive. Petitioner never shot anyone and sought to assist those who were being persecuted. On balance, the coercive force of the threats significantly outweighs the persecutory conduct identified by the Immigration Judge.

B. *Fedorenko* v. *United States* Provides No Support For The Court Of Appeals' Holding That The Bar Encompasses Involuntary Acts.

The government rests its interpretation of the persecutor bar largely on this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which held that a Nazi concentration camp guard was ineligible for asylum despite his claim that he had not volunteered to perform that task. Because *Fedorenko* interpreted a different statute with different language in a different statutory context—and could not and did not establish a general principle applicable to all immigration laws—*Fedorenko* is wholly inapplicable here.

The issue in *Fedorenko* was whether a man who had lied about his service as a Nazi concentration camp guard should be stripped of his citizenship under Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), which mandates

revocation of citizenship that was "illegally procured or * * * procured by concealment of a material fact or by willful misrepresentation."

Fedorenko maintained that the misrepresentation was not material because he would have been eligible for immigration under the Displaced Persons Act (DPA), notwithstanding his concentration camp service. This Court disagreed, concluding that he would properly have been denied citizenship under Section 2(a), which excluded from the definition of "displaced persons" individuals who had "assisted the enemy [i.e., the European Axis powers in World War II] in persecuting civil populations * * *." Annex I to the Constitution of the International Refugee Organization of the United Nations (Annex I), Part II, § 2(a) (incorporated by reference, DPA § 2(b)).

The Court rejected Fedorenko's claim that because he had not volunteered to serve as a guard, the DPA's persecutor exception should not apply. *Fedorenko*, 449 U.S. at 500. Though Federenko was a Ukranian prisoner of war, he was never threatened with torture or death. In fact, he was paid, received a merit award for his service, admitted to shooting at fleeing prisoners, and took regular leave from the concentration camp without ever attempting to escape.

In these circumstances, the Court held that under the "plain language of the Act, * * * an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa." *Fedorenko,* 449 U.S. at 512. The Court supported this conclusion by pointing to the next subsection of the relevant provision, which barred from immigration eligibility individuals who "*voluntarily* assisted the enemy forces since the out-

break of the Second World War in their operations against [the Allied forces]." Annex I Part II, § 2(b) (emphasis added) (incorporated by reference, DPA § 2(b)). The Court reasoned that "[u]nder traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." *Fedorenko,* 449 U.S. at 512 (emphasis in original).

Fedorenko is inapplicable here for three reasons.

First, this case does not involve the provision of Displaced Persons Act at issue in *Fedorenko*. Rather, it arises under an entirely different statute (the Refugee Act) enacted more than three decades later. Congress did not incorporate into the Refugee Act the language it had adopted in the Displaced Persons Act. Rather, it employed different language that had its origin in a different statute, the Indochinese Refugee Resettlement Act. See page 6, *supra*. In enacting the Refugee Act in 1980, moreover, Congress sought to conform U.S. law to the Nation's treaty obligations—treaty obligations that did not exist at the time the Displaced Persons Act was enacted. Those treaty obligations preclude the imposition of a persecutor bar on the basis of coerced acts. See pages 32-34, *supra*.[11]

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[11] The government argues (Opp. 8-9) that the definition of "refugee" in the relevant treaty (the 1967 Protocol, which adopts the definitions of the 1951 Convention) was based on "the same source as the definition Congress used in the DPA" and that *Fedorenko* therefore is controlling here. Although both the Protocol and the DPA do point to the definition of refugee in the 1946 Constitution of the International Refugee Organization, there is a critical difference between the two. The DPA defines

Second, the Displaced Persons Act was adopted to address a unique historical event. It applied only to individuals "who on or after September 1, 1939, and on or before December 22, 1945, entered Germany, Austria, or Italy, and who on January 1, 1948, was in Italy or the American sector, the British sector, or the French sector of either Berlin or Vienna or the American zone, the British zone, or the French zone of either Germany or Austria"; German citizens who were "persecut[ed] * * * or detained" by "the Nazi government," or "obliged to flee such persecution"; and "native[s] of Czechoslovakia who ha[ve] fled as a direct result of persecution or fear of persecution from that country since January 1, 1948." DPA § 2(d).

The need to specify the domain of the statute with such exacting precision, of course, reflected the harsh realities of post-World War II Europe. The death toll of the Holocaust is estimated at 6 million Jews alone, with some 5 million other ethnic and social minori-

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"displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization ***and who is the concern of the International Refugee Organization***." DPA § 2(b) (emphasis added). The persecutor bar is not contained in the IRO Constitution's definition of "refugee"; rather, it is part of the definition of persons who "are the concern of the International Refugee Organization." See IRO Constitution Annex I, Part I(A) (definition of refugee) & Part II.2 (persecutor bar). Because the Protocol incorporates only the IRO Constitution's definition of refugee and does not require that such individuals also be "the concern" of the IRO (see 1951 Convention, Art. I(A)(1)), the Protocol does not adopt the DPA's persecutor bar. Rather, as we have discussed (see page 33, *supra*), the persecutor bar in the Convention is a separate provision (Art. I(F)) that specifically characterizes the disqualifying conduct as "crime[s]"—making clear that involuntary acts are not included.

ties and political resisters of Nazism. Justifying the DPA's uncompromising stance toward concentration camp prison guards, a DPA administrator who testified as an expert witness in *Fedorenko* explained, "'the crime against humanity that [was] involved in the concentration camp puts it into a different category.'" 449 U.S. at 510 n. 32.

While the DPA was meant to deal with a particular—and particularly heinous—crime against humanity in a category of its own, the Refugee Act was meant to reflect principles that would guide asylum policy generally with respect to a variety of conflicts. See pages 34-35, *supra*.[12]

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[12] Furthermore, there are significant differences between the conduct engaged in by Fedorenko and by petitioner. Fedorenko was a very enthusiastic concentration camp guard. Multiple survivors testified that they saw him beat prisoners and shoot others to death; one testified that Fedorenko was the guard who assaulted him with "an iron-tipped whip." 449 U.S. at 498 n.12. Fedorenko might well have been "forced" to serve as a guard insofar as he was conscripted to do so, but there was no evidence that he submitted only because of threats of death and torture, much less that he ever resisted the Nazis. On the contrary, "he was paid a stipend and received a good service stripe from the Germans, and * * * was allowed to leave the camp regularly [and] never tried to escape." *Id.* at 500. In addition, unlike petitioner, Fedorenko covered up his past and lied to U.S. immigration officials when applying for entry into the United States.

Petitioner's guard duty, on the other hand, was coerced by torture and threats of future torture. Indeed, it is not disputed that petitioner's captors *did* in fact torture him when they were dissatisfied with his behavior, beating him while forcing him to roll on the ground for days in heat. Moreover, petitioner was himself a prisoner: he certainly was not *paid* for his service, and could not leave the prison without risking execution. Petitioner also did not shoot or beat other prisoners and was beaten for helping those he could.

Third, the *Fedorenko* Court concluded that involuntary acts were encompassed under the subsection addressing persecution of civilians because of the contrast between that subsection and the immediately following provision addressing assistance to enemy forces. That contrast—the inclusion of "voluntarily" in the latter provision but not in the former provision—led the Court to conclude that the Congress that enacted the provision intended to include involuntary conduct within the former provision.

There is no such contrast in the 1980 Refugee Act. "Voluntarily" does not appear anywhere in the persecutor bar provisions. Accordingly, there is no expression of congressional intent to override the plain meaning of "persecution" and the general principle against imposing serious adverse consequences on the basis of involuntary acts.

Under the DPA, moreover, once a person was found to be eligible for a visa, he or she was entitled to the visa, subject to quota and priority limitations. The statute did not provide for the subsequent exercise of discretion with respect to persons eligible for a visa. In that circumstance—given the enormity of the crime against humanity—it is understandable that Congress decided to encompass involuntary acts within the prohibition.

The Refugee Act, by contrast, does provide for the exercise of discretion before an individual may be eligible to stay in the United States on a permanent basis. See pages 7-8, *supra*. The Attorney General may determine that the particular facts of an individual's case make a grant of asylum inappropriate notwithstanding the fact that the individual's persecutory conduct was coerced. Applying *Fedorenko*'s

approach to that very different statutory structure simply makes no sense.

The government observes (Opp. 7-8) that the statute the Refugee Act amended—the 1952 Immigration and Naturalization Act—contains provisions barring issuance of an immigrant visa to an alien who is a member of a totalitarian party that do not apply if the membership is "involuntary." Because those provisions do not involve asylum or "persecution," however, they do not indicate that the Congress enacting the Refugee Act viewed the term "persecution" standing alone to encompass involuntary conduct. Indeed, forced party membership typically may not be a product of threats of death or injury but rather a result of business or other necessities of daily life; the use of the modifier "voluntarily" therefore was arguably necessary to make clear that even memberships motivated by pressure falling short of coercion were not encompassed within those provisions. It provides no evidence regarding the meaning of "persecution."[13]

Fedorenko's interpretation of different language, contained in a different structure enacted in a different statutory context, does not apply to the Refugee Act. This Court accordingly should reject the government's argument for reflexive application of that decision to this case.

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[13] Moreover, the cited provisions address a different aspect of the immigration laws and were enacted in a different statute twenty-eight years earlier. In *Fedorenko*, by contrast, the provision including the modifier "voluntarily" was separated from the persecutor bar by a single line. See IRO Constitution Annex I, Part II § 2.

C. The Government's Interpretation Of The Persecutor Bar Is Not Entitled To *Chevron* Deference.

The government did not argue in its brief in opposition that its interpretation of the persecutor bar is entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That omission is not surprising, because there is no basis whatever for deference here.

To begin with, when the meaning of a statute is clear, there is no occasion for deferring to the government's interpretation. Judicial deference is appropriate only when "Congress has 'explicitly left a gap for an agency to fill.'" *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron*, 467 U.S. at 843-44). The meaning of the persecutor bar is clear from the language Congress used, the background legal principles against which it legislated, the statutory context, and the rule that ambiguous statutes should be construed in favor of asylum applicants. This case presents the prototypical situation in which there simply is no "gap" to fill.

Even if, contrary to our submission, the statutory language were ambiguous, the prerequisites for deference under *Chevron* are absent here. The government's interpretation is not based on reasoned decisionmaking, as *Chevron* requires (see 467 U.S. at 842-44). To the contrary, it rests on a mistaken view about the meaning of this Court's decision in *Fedorenko* and conflicts with pronouncements by the BIA and the Secretary of Homeland Security.

Rather than furnishing independent reasons based upon its expertise, the BIA has done nothing more than mechanically cite precedents involving the DPA, the statute at issue in *Fedorenko*. In *Matter of*

Rodriguez-Majano, 19 I. & N. Dec. 811 (BIA 1988), for example—the BIA's earliest published application of the INA's persecutor exception—the BIA cited *Fedorenko* for the conclusion that "participation or assistance of an alien in persecution need not be of his own volition to bar him from relief. * * * It is the objective effect of an alien's actions which is controlling." 19 I. & N. Dec. at 814-15. That decision did not even acknowledge that *Fedorenko* interpreted an entirely different statute, much less offer a reason for construing the persecutor bar, notwithstanding its different language and context, to embody the approach to involuntary action of the statute construed in *Fedorenko*.

An agency's assertion that it is compelled to adopt a particular interpretation by the statutory text or by judicial precedents is not reasoned decisionmaking. See, *e.g.*, *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 96 (1953) (Frankfurter, J.) (overturning agency determination that "was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress' judgment that [the position adopted by the agency was] desirable"). Because the BIA has failed to do anything more than rely on *Fedorenko*, it plainly has not exercised reasoned decisionmaking to which this Court can or should defer. See *SEC* v. *Chenery Corp.,* 318 U.S. 80, 89-90 (1943) (Frankfurter, J.) (refusing to defer to agency interpretation because "the Commission did not in this case proffer new standards reflecting the experience gained by it in effectuating the legislative policy. On the contrary, it explicitly disavowed any purpose of going beyond those which the courts had theretofore recognized").

Moreover, because of its reflexive reliance on *Fedorenko*, the BIA has never provided a reasoned ex-

planation for the inconsistencies between its interpretation of the persecutor bar and other statements by the BIA and other government agencies regarding the propriety of imposing penalties in the immigration context on the basis of involuntary acts. "Unexplained inconsistency" is the hallmark of "arbitrary and capricious" reasoning (*Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)), that precludes deference to the government's interpretation. See *Mead*, 533 U.S. at 227.[14]

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[14] Regrettably, this arbitrary and capricious decisionmaking is not uncommon at the BIA. The "'adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.'" *Morales Apolinar* v. *Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (quoting *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.)). See also, *e.g.*, *Bah* v. *Mukasey*, No. 07-1715, 2008 WL 2357411, at *10 (2d Cir. June 11,2008) ("we are deeply disturbed by what we perceive to be fairly obvious errors in the agency's application of its own regulatory framework. Congress has entrusted the agency with the weighty and consequential task of granting safe harbor to the deserving of those who flee to this country for protection. The claims of the petitioners before us, as set forth below, did not receive the type of careful analysis they were due"); *N'Diom* v. *Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (observing "the significantly increasing rate at which adjudication lacking in reason, logic, and effort" reaches the federal courts); *Chen* v. *United States Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (finding the IJ's holding "grounded solely on speculation and conjecture"); *Fiadjoe* v. *Attorney General*, 411 F.3d 135, 154-55 (3d Cir. 2005) (noting the IJ's "hostile" and "extraordinarily abusive" behavior toward petitioner "by itself would require a rejection of his credibility finding"); *Korytnyuk* v. *Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("it is the [IJ's] conclusion, not [the petitioner's] testimony, that 'strains credulity'"); *Ssali* v. *Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("[t]his very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Kourski* v. *Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004)

For example, in *In re A-H-*, 23 I. & N. Dec. 774 (2005), the Attorney General issued broad guidance for interpreting the persecutor bar at issue in this case, addressing whether "a leader-in-exile of a political movement may be found to have incited, assisted, or participated in acts of persecution in the home country by an armed group connected to that political movement." *Id.* at 785 (internal quotation marks omitted). In the course of his analysis, the Attorney General concluded that "[i]t is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies." *Ibid.*

The Attorney General cited *Hernandez* v. *Reno*, 258 F.3d 806, 814 (8th Cir. 2001), a decision that—as the government itself acknowledges (Opp. 11)—rejects the government's view of the persecutor bar and adopts a "totality of the circumstances" test that acknowledges the relevance of duress. See also Pet. 13-14. Neither the Attorney General, the Secretary of Homeland Security, nor the BIA has *ever* addressed how the government's endorsement in *In re A-H-* of the Eighth Circuit's position on the relevance of coercion can be reconciled with the BIA's position in this and other cases that coercion is "irrelevant" under the persecutor bar.

The position that duress is irrelevant under the persecutor bar also conflicts with the government's interpretation of other immigration provisions. As we have discussed (see page 30, *supra*), the INS, the BIA's predecessor, recognized, in a still-extant policy, that duress excuses violation of Section 273(b) of the INA, which prohibits the bringing of undocumented aliens into the country. Immigration and Naturaliza-

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("[t]here is a gaping hole in the reasoning of the board and the immigration judge").

tion Service, General Counsel's Office, *Standard for Prosecutorial Discretion under Section 273 of the Immigration and Nationality Act*, Genco Op. No. 93-66, 1993 WL 1504013, at n.7 (1993). The Secretary of Homeland Security has also recognized the relevance of duress to application of the so-called "material support bar" (8 U.S.C. § 1182(a)(3)(B)), which prohibits the granting of asylum to individuals who give assistance to terrorists. See pages 30-31, *supra*.

If the BIA has discretion to determine whether involuntary acts are encompassed within the persecutor bar, then the BIA is obliged to offer a reasoned justification for that policy choice, including explaining it in relation to the other relevant positions that it and other government agencies have adopted. Indeed, it appears anomalous that individuals who are forced to contribute to terrorist acts, including those aimed at the United States, would be afforded more solicitude than individuals who suffer the horrific fate of being turned into human swords abroad. In the absence of any account of why this constellation of policies makes sense, the government's position is arbitrary and capricious and not entitled to deference.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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